Supreme Court, U.S.
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In the

# Supreme Court of the United States

OLIVER MORTON,

*Petitioner,*

*v.*

ABRAHAM HEWITT and DOREEN HEWIT,

*Respondents.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

## PETITION FOR A WRIT OF CERTIORARI

Oliver Morton
P.O. Box 2488
Kingshill, St. Croix
U.S. Virgin Islands 00851
(340) 778-1912
*Petitioner*

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

## QUESTIONS PRESENTED

1. Did the Third Circuit Court of Appeals fail to analyze the record on appeal, and thus issue a written opinion justifying affirmation of a money damages judgment against Petitioner Oliver Morton, who reconstructed two homes for Respondents, the Hewitts, after Hurricane Hugo, although the record showed uncontradicted substantial elements of the judgment?

2. Is the issuing and affirming of federal court judgments contradicted by the case so dangerous and important a departure from the expected and usual course of judicial proceedings, as exemplified by this case, that the Supreme Court should issue a writ of certiorari here in the exercise of its supervisory power over other federal courts.

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit of August 28, 2003, referenced above, is appended hereto and is unreported. The opinion of the United States District Court of the Virgin Islands, Division of St. Croix, Appellate Division, of May 13, 2003, is appended hereto and is unreported. The opinion of the Territorial Court of the Virgin Islands, Division of St. Croix, of April 14, 1999, is appended hereto and is unreported. The October 2, 2003, order of the Third Circuit denying the petition for a panel rehearing is appended hereto and is unreported.

## STATEMENT

The judgment of the United States Court of Appeals for the Third Circuit was entered on August 28, 2003. A timely petition for panel rehearing was denied on October 2, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1) (1988).

## RELEVANT PROVISIONS

The Fifth Amendment to the United States Constitution provides: "No person shall be ... deprived of life, liberty, or property, without due process of law ... ." Statutory provisions upon which jurisdiction rests are not in issue, and it is the understanding of the undersigned in that jurisdictional provisions are not normally set out verbatim in this type of petition.

## STATEMENT

Oliver Morton, the Petitioner, respectfully prays that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Third Circuit entered in this case on August 28, 2003 (and the Circuit Court order denying rehearing entered on October 2, 2003).

The Third Circuit had jurisdiction under 28 U.S.C. §1291(1982) since it involves a final decision of (the Appellate Division of) the United States District Court of the Virgin Islands, and 28 U.S.C, §1294(3)(1982), since it is an appeal from (the Appellate Division of) the United States District Court of the Virgin Islands. The Appellate Division of United States District Court of the Virgin Islands had jurisdiction pursuant to the *Revised Organic Act of the Virgin Islands* § 23A (48 U.S.C. §1613a), and 4 V.I.C. § 33 (1976). That court reviewed the opinion and final order of the Territorial Court of the Virgin Islands, which had subject matter jurisdiction under the *Revised Organic Act of the Virgin Islands* § 21(b)(1984)(48 U.S.C. §1611(b)) and 4 V.I.C. § 76(a)(1990) since the subject of the lawsuit is a construction dispute accruing in St. Croix, U.S. Virgin Islands.

This is a petition for review of decisions of the Territorial Court of the Virgin Islands; the United States District Court of the Virgin Islands, Appellate Division; and the Third Circuit Court of Appeals awarding construction contract breach damages against Petitioner Oliver Morton, who, as a contractor, reconstructed two residential homes for Respondents

Abraham Hewitt and Doreen Hewitt after Hurricane Hugo blew through the island of St. Croix in the United States Virgin Islands in September 1989, and denying Mr. Morton's claim for construction contract breach damages from Respondents.

Respondents Mr. and Mrs. Hewitt filed their complaint with the Territorial Court of the Virgin Islands in July 1992, seeking, in relation to post-Hurricane Hugo reconstruction work at two residences, one at 37 (the residence of Mr. and Mrs. Hewitt) and one at 22B (a rental house) Estate Rattan, St. Croix, U.S. Virgin Islands: (1) reimbursement for the claimed value of reconstruction work they themselves did at 37 and 22B Estate Rattan, St. Croix; (2) reimbursement for the cost of materials they incorporated into the project; and (3) damages for the claimed anticipated cost of completion of the reconstruction project at 22B, as well as prejudgment interest and costs including attorney's fees.

Hurricane Hugo ripped the roof off of the Hewitt residence at No. 37, causing other extensive damage; and basically demolished No. 22B. Petitioner Oliver Morton had been the Hewitts contractor for the reconstruction. In his answer and counterclaim, Mr. Morton denied the validity of the Hewitt claims, and counterclaimed that he was owed substantial moneys from the Hewitts in connection with the reconstruction work he did at the residences. Mr. Morton had been holding the keys to no. 22B while trying to work out a settlement with the Hewitts on their construction dispute. But no settlement was forthcoming, and in March 1993, the court ordered Mr. Morton to return to the Hewitts the keys for the house at 22B Estate

Rattan, one of the two houses reconstructed by Mr. Morton for the Hewitts.

The Hewitts had claimed in their complaint that the Morton reconstruction work had been done under written construction contracts, which Mr. Morton denied. It took over a year of letter writing by Mr .Morton' s counsel before the Hewitts finally produced copies of two one-page, less-than-bare-bones documents that the Hewitts claimed were construction contracts signed by Mr. Morton. They are too vague to constitute enforceable construction contracts, and Mr. Morton did not sign them anyway. The trial commenced in January 1996, continuing into seven days of testimony over ten months, ending in November 1996.

On April 14, 1999, *two years and five months after testimony concluded and oral arguments were made, the court entered its judgment* and memorandum opinion awarding to the Hewitts $48,579.10 on their complaint. The judgment was composed, with regard to no.37, of: (1) $8,757.92 for the claimed cost to the Hewitts of Mr. Morton's adding of two feet to the walls supporting the roof; (2) $5,500 for out of-pocket material expenses; and (3) nominal damages of $3 for delayed performance, two rafters that were improperly spaced, and alleged unauthorized work; and, with regard to no. 22B: (4) $20,469.18 for "the costs of completion"; (5) $13,848 for the value of the Hewitts' personal labor expended at 22B and (6) a nominal $l for out-of-pocket expenses for materials. The court also awarded prejudgment interest and unspecified costs and attorney's fees; and denied the counterclaim of Mr. Morton.

After the filing of the notice of appeal to the Appellate Division of the United States District Court of the Virgin Islands, the trial court entered an order awarding the Hewitts $2,283.08 in costs other than attorney's fees and $14,662.50 in attorney's fees. Mr. Morton filed a supplemental notice of appeal. The Appellate Division of the District Court did not allow oral argument. The appeal of its order to the Third Circuit was timely filed.

Mr. Morton's on-the-job post-Hugo reconstruction work for the Hewitts commenced in August 1990 - at no.37 - and ended 20 months later with Mr. Morton shutting down the job at no. 22E in March 1992. Mr. Morton's refusal to continue work on the job - which ended up being a permanent refusal - occurred when the Hewitts insisted that he install different windows in the garage and different floor tiles upstairs. This proved to be the straw that broke the camel's back of a long-simmering dispute over the basis of the owner-contractor bargain and the inadequacy of payments to Mr. Morton.

During the 20 months he worked for the Hewitts reconstructing no.37 and no. 22B, Mr. Morton was paid by the Hewitts $218,954.20 as determined by the court. Mr. Morton testified that as the contractor, for labor and materials on the job, he paid out to others an amount that just about equalled what he was paid, in gross, by the Hewitts - what he paid out to others came within about $2,000 of the money paid to him by the Hewitts. In fact, he testified that during the Hewitt job he took on a few other miscellaneous minor jobs because the Hewitt job was not supporting his family. Mr. Morton reported that

> "I was doing other work because I had to find a means of supporting my family. ... I had to find way of means to provide for my family. Mr. Hewitt knows that because he told me so. ...[reporting that Mr. Hewitt said] 'Mr. Morton, I know you have to do other work because you have to support your family.'"

He even reported a loss on his income tax return for the last year of work for the Hewitts. Mr. Morton testified that nonetheless he spent 80 to 85% of his time on the Hewitt jobs.

Mr. Morton's expert, Taylor Babb, a licensed structural engineer with extensive experience in construction jobs in St. Croix, in using what he considered low per-square-foot pricing, opined that the work Mr. Morton did at no.37 was valued at $247,388; and at 22B the value of Mr. Morton's work was $143,569, for a total of $390,957 as the value of the reconstruction work done by Mr. Morton at both no.37 and 22B Rattan. This leaves (after subtracting $218,954.20 in payments) a principal balance owed of at least $172,002.80, if Mr. Morton is entitled to the value of his work.

Neither Mr. nor Mrs. Hewitt nor their expert Larry French testified to an agreed-upon cost for the additional work Mr. Morton did beyond the "contract" work, nor testified to the value of the work performed by Mr. Morton, except that Mr. French said that the cost of raising the walls two feet at no. 37 would amount to $8,757.92. Note that Mr. French never criticized the raising of the roof or said it was unnecessary.

To make a long story short, Mr. Morton, at the request of Mr. Hewitt, prepared written estimates shortly after the hurricane to reconstruct the two houses in their original wooden condition for the amount of $80,000 for No. 37, and $75,000 for 22B. Mr. Hewitt claimed that Mr. Morton entered into two one-page contracts to reconstruct the houses for these prices, which Mr. Morton denied. The existence of written construction contracts became a minor issue, however, because the April 1990 "contracts" were short and vague and did not call for the vast majority of work the Mr. Morton was requested to perform, and that he did perform at both sites.

The "contract" for No. 37 called for: the replacement and repair damaged walls and doors, without specifying which should be replaced in which repaired; the replacement of the damaged roof; the replacement of electrical and plumbing; the repair or replacement of structural or real property improvements, without specifying what was to be repaired in what was to be replaced, and replaced with what; the repair of disaster – damaged landscaping and repair of windows, but without giving any details of what work was to be done.

The actual work performed at No. 37 was radically different and more extensive than that called for by the "contract." Mr. Hewitt insisted that Mr. Morton brace an outer decorative brick wall, and demolish the true outer wooden wall immediately inside the brick wall, and replace the demolished wall with a concrete block wall, and fill in the gap between the brick wall and a concrete wall with poured concrete, resulting in an integrated outer wall about 12 inches

thick. Mr. Hewitt insisted that all of the inside sheet-rock walls be replaced with concrete walls.

The Hewitts instructed Mr. Morton to build a 60 ft. by 10 foot addition along the southern face of the building, which included a sewing room, a new master bathroom with a built-in tub, a pantry with cabinets hand-made by Mr. Morton, an entirely new kitchen (which supplemented the kitchen already inside the house, which was also rebuilt by Mr. Morton), an enclosed "mud room," and the utility room.

At a request of the Hewitts, Mr. Morton also built an extra bathroom, he combined two bathrooms into one, constructed several poured concrete arches, built a new closet for the master bedroom as well as new cabinets and vanities, and installed new ceramic tile throughout. He installed a specially requested beam in the living room and constructed a 19-foot long concrete walkway to get to the gas tank in the backyard, as well as constructing a new fancy garage door.

None of this work was specified in the one-page "contract" for No. 37, and it was performed under very stressful conditions, with constant requests for additional more extensive work and disagreements between Mr. and Mrs. Hewitt.

Now here are the facts that are of particular concern in this petition, facts that underlie the first element of damages enumerated above, assessing Mr. Morton $8,757.92 in damages for raising the walls at no. 37 two feet. These facts show the failure of the Court of Appeals to analyze the record before rubber-stamping

the judgment in this case: Mr. Morton suggested that he should put a shed-type roof over the addition running along the south wall. But Mrs. Hewitt did not like this idea, and insisted that the addition be under the same roof as the rest of the house. The Hewitts eventually decided that they wanted to radically change the structure of the roof from a simple gabled roof (shaped like an inverted "v"), to a hip roof. Furthermore the Hewitts told Mr. Morton that he had to preserve all of Mr. Hewitt's decorative brick wall in the process. The hip roof requires all the supporting walls to be uniform in height. On top of this, the Hewitts decided to change from a corrugated metal roof to a very heavy coated plywood roof (two-sheets thick with felt in between), which requires greater slope in order to assure full drainage of rainwater. All of these requirements resulted in the need for Mr. Morton to raise the height of the wall, and to cap it off with a very substantial 14 to 15-inch bond beam.

Although there were no plans whatsoever for the reconstruction of No. 37, Mr. Morton agreed to comply with this request of Mr. and Mrs. Hewitt, as he had with all the other changes and additions. Without any plans, he had to figure out on his own how much higher he would have to raise the center supporting wall under the ridge beam. (Bizarrely, the trial court refused to allow inquiry into Mr. Morton's educational background.) Mr. Morton constructed a load-bearing center inside wall of concrete block and poured concrete that supports the roof ridge beam. When Mrs. Hewitt saw how high it was going, she brought it to the attention of Mr. Hewitt, who told Mr. Morton that the wall was going too high. Mr. Morton replied, "No, Mr. Hewitt, it's not going to be too high." Mr. Hewitt

testified that Mr. Morton "told me he know [sic] what he is doing. I say, all right, you are the boss", and let Mr. Morton continue with his work. Mr. Hewitt admitted "I didn't argue with him." Mr Hewitt, despite daily presence on the job (He and Mrs. Hewitt were living on the premises throughout the reconstruction.), chose not to stop the construction of this center wall. As Mr. Morton said at trial "Mr. Hewitt could have stop [sic] me if he was living there."

Mr. Hewitt claims that several times he asked Mr. Morton for an estimate for the addition and for other extras, but that he had trouble getting a figure from Mr. Morton. Mr. Hewitt said that finally, "After a while I say I will just have to pay him what it comes to." Mr. Hewitt said, "I had ask [sic] him to give me some estimate and some extension. He never did give it to me. I ask [sic] him several times. I really got disgusted; and I let him go ahead; and I decide [sic] that whatever it cost, I will pay." Mr. Hewitt said, "Mr. Morton, whatever are [sic] beyond your estimate, I will pay the difference to you." And again, "Mr. Morton, whatever it takes, I will put my money into it to get what I want." Mr. Morton said he had trouble trying to making estimates because of all the constant changes.

All in all, it was a very high quality job. Mr. Hewitt told Mr. Morton, "I didn't expect this building to come out so good. It's a lot of work are involve [sic], Mr. Morton. Your name is on the building." Mr. Babb testified that it was high quality work; and with the exception of two rafters on the east end hip that were improperly centered, Larry French, the Hewitts' expert, did not criticize the work. By the way, Mr. Morton noticed the two improperly spaced hip rafters

the day they were put up and told Mr. Hewitt he would take them down and have his worker re-do it, but Mr. Hewitt said it was no big deal and just leave them up. Mr. Morton testified to this and Mr. Hewitt never contradicted him.

The length of this petition does not permit delving into all the other facts of this construction dispute. There were similar problems in the reconstruction of No. 22 B. There, there were plans, but they were the old plans for the wooden house. 22B as reconstructed at the request of Mr. and Mrs. Hewitt, was larger than it had been before. The plans were of limited usefulness since the building was being reconstructed in concrete. Again, the bare-bones one-page "contract" gave almost no details and left room for constant disputes, including the dispute that eventually led to the shutting-down of the job.

## REASONS FOR GRANTING THE WRIT

The Fifth Amendment to the United States Constitution provides that, "No person shall be ... deprived of life, liberty, or property, without due process of law ... ." But in this case, if the Supreme Court allows the decision of the Third Circuit to stand, the Petitioner, Mr. Morton, and will be deprived by the United States of property without due process of law. Due to space limitations, Petitioner has focused on one particular substantial element of the damages assessed against him, and has pointed out that the record of the case, beyond peradventure, demonstrates that this element – the award of $8,757.92 in damages against him for raising the height of the wall as the circumstances demanded he must – is completely

without justification. The complicity of the federal appellate court system with this taking of property from Mr. Morton without any justification amounts to a violation of his constitutionally protected rights.

Now, Petitioner Oliver Morton realizes that a petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Petitioner realizes that there must be special and important reasons to grant the petition. *Fay v. Noia*, 372 U.S. 391 (1963). The "special and important reasons," relate to problems beyond the academic or episodic, especially where the issues involved reach constitutional dimensions, involving principles the settlement of which is of importance to the public, as distinguished from that of the parties. *Rice v. Sioux City Memorial Parks Cemetery*, 349 U.S. 70 (1955).

Here we have special circumstances involving a constitutional principle of importance to the public – the need for the United States Supreme Court to exercise its supervisory power to make it clear to the Third Circuit in this case, and to all circuit and district courts in all federal cases, that the federal courts cannot deprive a litigant of his property if the facts of record demonstrate that such deprivation is without factual support. Mr. Morton was confronted with a situation where he had to figure out on his own without plans how high the roof needed to go. He made his best judgment and went with it. Mr. and Mrs. Hewitt, who were living at the job site, allowed Mr. Morton to proceed when the question of the height of the wall came up. No one testified at trial that the roof was raised too high, not even the expert for Mr. and Mrs.

Hewitt. Yet, the trial court (which is in essence a federal court since the United States Virgin Islands is not a separate sovereign from United States), a federal district court, and a federal court of appeals, entered and affirmed repeatedly the unjust judgment, completely ignoring the facts of record.

When one reads the opinions of the Third Circuit and of the Appellate Division of United States District Court of the Virgin Islands, one cannot find anywhere an analysis of the factual record regarding the raising of the height of the wall, although a substantial part of the judgment is for damages for raising the wall. The appellate courts completely ignore this issue. It is extremely frustrating to a litigant to see court after court ignore the facts and perform no analysis whatsoever of the actual facts of the case. The Supreme Court should not allow courts under its supervisory power to so cavalierly ignore their duty to see that justice is done in each case.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. The Court should vacate the decision of the Court of Appeals for the Third Circuit and the underlying decisions and order the entry of an order below consistent with the order of this Court.

Respectfully Submitted,

Oliver Morton
*Counsel of Record*
P.O. Box 2488
Kingshill, St. Croix
U.S. Virgin Islands 00851
(340) 773-3322

(Any footnotes trail end of each document)

No: 02-2478

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ABRAHAM HEWITT; DOREEN HEWITT

v.

OLIVER MORTON,

Appellant

April 28, 2003, Argued

August 28, 2003, Filed

**NOTICE:** RULES OF THE THIRD CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

**COUNSEL:** George W. Cannon, Jr., Esquire (Argued), St. Croix, USVI, for Appellees.

Edward H. Jacobs, Esquire (Argued), Jacobs & Brady, St. Croix, USVI, for Appellant.

**JUDGES:** Before: ROTH, MCKEE and COWEN, Circuit Judges.

**OPINIONBY:** Jane R. Roth

**OPINION:** ROTH, Circuit Judge:

Oliver Morton, a licensed contractor, prepared written estimates for repairs to two properties of Abraham Hewitt. The properties had been extensively damaged by Hurricane Hugo. Formal documents were prepared which contained slightly more general specifications than did the estimates and which outlined the scope of work to be performed at a cost broken down into payments due at stages of completion over a 90-day period. Morton completed work on the first property in November 1991. However, as the Territorial Court found, he improperly laid out the roof and built the walls higher than requested. Morton ceased work on the second property in March 1992 as a result of the dispute with Hewitt. During the course of construction, Morton was regularly absent from the job site, left the site undermanned while working on other projects, and made unauthorized changes over and above the changes requested by Hewitt.

Hewitt filed suit for breach of contract in July 1992. Morton defended on the basis that (1) no contract existed; (2) if a contract did exist it was too uncertain to be enforced; and (3) he was not in breach. The Territorial Court found that an express contract did exist, that it was of the requisite certainty, and that it was materially breached. The court awarded $ 48,579.10 in damages to Hewitt. The court also denied Morton's counterclaim for restitution. The Appellate Division affirmed, and Morton appealed.

Our standard of review is plenary because questions concerning contract existence, certainty, and breach are matters of contract construction. *See Ram Constr. Co.*,

*Inc. v. American States Insurance Co.* 749 F.2d 1049, 1053 (3d Cir. 1984). Applying this standard, we will affirm the judgment of the Appellate Division.

Specifically, we hold that an express contract existed between the parties, its formation occurring when Morton accepted Hewitt's offer by beginning work on the properties. "Acceptance by performance requires that at least part of what the offer requests be performed or tendered . . . ." *Restatement (Second) of Contracts* § 50(2) (1981). This was an express contract, because the nature of the work to be done and the price to be charged was set forth through the dealings between the parties and the language in the estimates. *See Restatement (Second) of Contracts* § 4 (1981).

Morton argues, however, that the terms of the documents were too vague. Specifically, he contends that, although the documents called for repairs of particular rooms and structures, they did not mention what parts or features of the room or structure should be repaired or replaced, or what materials should be used in doing so. We disagree. Our review of the record convinces us that the Territorial Court properly determined that the parties, through their dealings and through the language of the estimates, created express contracts for the repair of each property.

We also hold that Morton breached the contracts when he delayed completion of the first job and abandoned the second job. Although builders may waive or extend completion deadlines, waivers or extensions that are silent as to duration extend the deadline only for a reasonable time. *Curtis Elevator Co., v. Hampshire House, Inc.*, 142 N.J. Super. 537, 362 A.2d 73, 76

(N.J.Super. 1976). Expert testimony established that nine to twelve months was a reasonable time for completion of the repairs. Thus, Morton's 17 months' completion time was in fact unreasonable and placed him in breach. Moreover, we agree with the Territorial Court's holding that the dispute between the parties over installation of windows and tiles on the first property was not justification for abandoning work on the second.

Morton counterclaimed for restitution for the value of his services. The Territorial Court denied the counterclaim on the ground that it was not supported by the evidence. Moreover, restitution is not available where an express contract exists. See Christian v. Joseph, 23 V.I. 193, 200 (D.V.I. App. 1987).

For the above reasons, we will affirm the order of the Appellate Division, affirming the judgment of the Territorial Court.

TO THE CLERK:

Please file the foregoing Opinion.

By the Court,

/s/ Jane R. Roth

Circuit Judge

Civ. App. No. 1999/93-A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF THE VIRGIN ISLANDS, DIVISION OF ST. CROIX, APPELLATE DIVISION

Oliver Morton,
Appellant,

v.

Abraham Hewitt and Doreen Hewitt,
Appellees.

April 12, 2002, Considered
May 13, 2002, Filed

**COUNSEL:** Edward Haskins Jacobs, Esq., St. Croix, U.S.V.I., Attorney for Appellants.

George W. Cannon, Jr., Esq., St. Croix, U.S.V.I., Attorney for Appellees.

**JUDGES:** BEFORE: THOMAS K. MOORE, Judge of the District Court of the Virgin Islands; STANLEY S. BROTMAN, Senior Judge of the U.S. District Court for the District of New Jersey; and ISHMAEL A. MEYERS, Judge of the Territorial Court of the Virgin Islands, Division of St. Thomas, Sitting by Designation.

OPINION:

OPINION OF THE COURT

PER CURIAM.

Oliver Morton ["Morton" or "appellant"] appeals the Territorial Court ruling that an express contract existed between Morton and Abraham and Doreen Hewitt [collectively "Hewitts" or "appellees"] and awarding the Hewitts damages for Morton's breach of that contract. For the reasons set forth below, we will affirm the Territorial Court's judgment in favor of the Hewitts.

## I. FACTUAL AND PROCEDURAL BACKGROUND

After Hurricane Hugo swept through the Virgin Islands in September of 1989, the Hewitts suffered extensive damage to two of their homes, Estate No. 37 Rattan ["Plot 37"] and Estate No. 22-B Rattan ["Plot 22-B"]. The appellees approached appellant Morton, a licensed repair and maintenance contractor, to give them estimates for the repair of both houses. Morton complied with the Hewitts' request and provided estimates of $ 80,000 and $ 75,000 for Plots 37 and 22-B, respectively. The Hewitts then took these estimates to the Small Business Administration ["SBA"] to obtain a loan. Finding the estimates to be insufficient, the SBA informed the Hewitts that the estimates needed to be typewritten and in a certain format. The Hewitts subsequently informed Morton what the SBA required and provided him with an example of the format. Morton, in turn, had his estimates typed up in accordance with the SBA example. The Hewitts then took these typed documents back to the SBA and

received loans with the amounts of $ 77,600 for Plot 37 and $ 34,900 for Plot 22-B. n1

Upon receiving the loans from the SBA, the Hewitts asked Morton to begin work reconstructing Plots 37 and 22-B. Sometime in June of 1990, Morton began work on Plot 37. He later started work on Plot 22-B in October of that same year. Each job was to take 90 days. Various problems arose during these construction periods, including, *inter alia*, the Morton's absences from the work site, the Hewitts' numerous changes to the reconstruction plans, and Morton's unauthorized additions to the structures. As a result of these problems, Morton did not complete his work on Plot 37 until November of 1991 and eventually abandoned his work on Plot 22-B, leaving it 75-85 percent complete.

The Hewitts then brought suit against Morton in the Territorial Court for breach of contract. After a bench trial, the trial judge found that an express contract existed between the parties and that Morton had breached this contract. The trial judge then awarded the Hewitts $ 14,257.92 in actual damages and $ 3 in nominal damages to Plot 37 and $ 34,317.18 in actual damages and $ 1 in nominal damages to Plot 22-B. Morton now timely appeals the Territorial Court's judgment on the grounds that the trial court erred in (1) concluding that the estimates constituted enforceable construction contracts; (2) concluding that appellant breached any construction contract by job delay; (3) assessing actual and nominal damages against the appellant; and (4) rejecting appellant's counterclaim for *quantum meruit* damages.

## II. DISCUSSION

### A. Jurisdiction and Standard of Review

This Court has jurisdiction to review final judgments and orders of the Territorial Court in all civil matters. *See* 4 V.I.C. § 33. n2 Questions involving contract construction - the legal operation of a contract - is a question of law mandating plenary review. *See In re Cendant Corp. Prides Litig.*, 233 F.3d 188, 193 (3d Cir. 2000); *Nibbs v. Roberts*, 31 V.I. 196, 204 (D.V.I. App. Div. 1995) ("The trial court's decision concerning the application of a legal precept is subject to plenary review."). Contract interpretation, on the other hand, is a question of fact, which is reviewed under a clearly erroneous standard. *See In re Cendant Corp.*, 233 F.3d at 193; *Nibbs*, 31 V.I. at 204.

### B. The Territorial Court Did Not Err in Concluding That An Express Contract Existed

It is well-settled law that "the test for enforceability of an agreement is whether both parties have manifested an intention to be bound by its terms and whether the terms are sufficiently definite to be specifically enforced." *See ATACS Corp. v. Trans World Communications, Inc.*, 155 F.3d 659, 665 (3d Cir. 1998) (citations omitted). Although offer, acceptance, and consideration are required elements of contract formation, "the decisive inquiry in contract formation is the 'manifestation of assent of the parties to the terms of the promise and to the consideration for it . . . .'" *See id.* at 665-66 (quoting 1 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 23, at 51 (Walter H. E. Jaeger ed., 3d ed. 1957)) (alterations in original); *see also Gardiner v. Virgin Islands Water &*

*Power Auth.*, 896 F. Supp. 491, 497 (D.V.I. 1995) ("The only essential prerequisite for creation of a valid contract is that the parties mutually assent to the terms and conditions of the agreement."), *aff'd*, 145 F.3d 635 (3d Cir. 1998). According to the Restatement (Second) of Contracts, n3 "manifestation of mutual assent to an exchange requires that each party either make a promise or begin or render a performance." RESTATEMENT (SECOND) OF CONTRACTS § 18; *see also id.* § 19(1) ("The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act."). It is clear from the record below that the parties to this action manifested their mutual assent to be bound by contract.

Morton puts considerable effort into disproving the trial court's determination that the estimate documents for Plots 37 and 22-B constituted express contracts by alleging that he did not sign the purported estimate agreements and that the signature on it was a forgery. The appellant argues that this lack of signature rendered the contracts unenforceable. The appellant's efforts are misplaced, however, as the trial court correctly noted that Morton's performance of the contemplated work created an enforceable agreement between the parties. (J.A. at 16-17.) According to the Morton's own testimony, the Hewitts asked him to start work reconstructing Plot 37. (*Id.* at 388.) Although Morton did not immediately accept this offer because he was busy with other projects, he stated that he would let them know once he had finished these other projects. (*Id.*) Sometime later, the Hewitts again asked Morton to start work on Plot 37 and even provided him with a check for $ 10,000 and he thereafter began the

work. (*Id.* at 388-94.) While Morton was working on Plot 37, the Hewitts asked him to start work on Plot 22-B as well and Morton did so. (*Id.*) By starting work on Plots 37 and 22-B, Morton effectively accepted the Hewitts' offer. *See* RESTATEMENT (SECOND) OF CONTRACTS § 34(2) ("Part performance under an agreement may remove uncertainty and establish that a contract enforceable as a bargain has been formed."); *see also id.* § § 50-70 (acknowledging that performance constitutes acceptance of an offer). Moreover, these contracts were express because the parties, through their dealings and in the language of the estimates, set forth the nature of the work involved. *Accord id.* § 4 ("A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct."). n4 Even assuming *arguendo* that the estimates for Plots 37 and 22-B do not, by themselves, constitute express contracts, the totality of the circumstances supports the view that an express contract existed between the parties to reconstruct these homes. Thus, the trial court did not err in finding that the estimates for Plots 37 and 22-B constituted express contracts.

> RESTATEMENT (SECOND) OF CONTRACTS § 4 cmt. a.

**C. The Language of the Estimates Is Reasonably Certain To Create Enforceable Agreements**

The appellant argues that to the extent express contracts exist, they are unenforceable because the terms are insufficient according to section 33(2) of the Restatement (Second) of Contracts "to provide a basis

for determining the existence of a breach and for giving an appropriate remedy." Apparently, Morton believes that for the terms of a contract to be "reasonably certain" they must be spelled out in detail. He, however, misconstrues the meaning of section 33(2). "The test is not certainty as to what the parties were to do nor as to the exact amount of damages due to the plaintiff." RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. b. What is required is that a court be able to ascertain whether a breach occurred and what the remedy would be. *See id.* ("Courts decide the disputes before them, not the hypothetical disputes that might have arisen."). Here, the language of the written documents listed the work to be done, the costs associated with the work and the time-frame in which to do the work. Thus, this language was sufficiently certain to allow the trial court to conclude that Morton's delays in completing the work, his unauthorized additions and abandonment of work on Plot 22-B constituted breaches warranting appropriate remedies.

**D. The Trial Court Did Not Err in Awarding the Appellees Damages and Rejecting the Appellant's Counterclaim**

"Appellate courts will not disturb factual findings unless 'the determination [of the trial court] is either (1) completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data.'" *Nibbs*, 31 V.I. at 204; *see also* 4 V.I.C. § 33 ("Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the territorial court to judge the credibility of the witnesses."). After a bench trial in

which it heard the testimony of all the parties and reviewed the evidence, the Territorial Court issued a well-reasoned and articulated decision awarding the Hewitts damages and rejecting Morton's counterclaim for *quantum meruit*. n5 As this Court finds that the evidence provided supports the trial court's decision, we will affirm its ruling.

## III. CONCLUSION

The Territorial Court did not err in concluding that an express, enforceable agreement existed between the parties. Moreover, the terms of the contract were reasonably certain to enable the trial court to determine whether a breach had occurred and the basis for the appropriate remedy. Finally, the trial court committed no clear error in awarding the appellees damages and denying the appellant's counterclaim.

## ORDER

For the reasons set forth in the foregoing Memorandum of even date, it is hereby

**ORDERED** that the Territorial Court's order is **AFFIRMED.**

**ENTERED this 13 day of May, 2002**

**Copies to:**
Hon. Stanley S. Brotman
Hon. Ishmael A. Meyers
Hon. Geoffrey W. Barnand
Hon. Jeffrey L. Resnick
Territorial Court Judges

Edward H. Jacobs, Esq.

George W. Cannon, Jr., Esq.

Mrs. Cicely Francis

Mrs. Kim Bonelli

St. Croix law clerks

St. Thomas law clerks

Footnotes

n1 Appellees later requested and received reductions in these loans to $ 65,000 and $ 10,000, respectively.

n2 *See* Revised Organic Act of 1954 § 23A; 48 U.S.C. § 1613a. The complete Revised Organic Act of 1954 is found at 48 U.S.C. § § 1541-1645 (1995 & Supp. 2002), *reprinted in* V.I. CODE ANN. 73-177, Historical Documents, Organic Acts, and U.S. Constitution (1995 & Supp. 2002) (preceding V.I. CODE ANN. tit. 1).

n3 *See* 1 V.I.C. § 4 ("The rules of the common law, as expressed in the restatements of the law by the American Law Institute . . . shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.").

n4 Contracts are often spoken of as express or implied. The distinction involves, however, no difference in legal effect, but lies merely in the mode of manifesting assent. Just as assent may be manifested by words or other conduct, sometimes including silence, so intention to make a promise may be manifested in language or by implication

from other circumstances, including course of dealing or usage of trade or course of performance.

n5 Claims arising from quasi-contracts and express contracts are mutually exclusive. If the contract is express, a party cannot claim *quantum meruit. See Christian v. Joseph*, 23 V.I. 193, 200 (D.V.I. App. 1987) ("Where there is uncontradicted evidence of an agreed upon price, a court should not award damages on the basis of quantum meruit.").

CIVIL NO. 771/1992

IN THE TERRITORIAL COURT
OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX AT KINGSHILL

ABRAHAM AND DOREEN HEWITT,
Plaintiffs,

v.

OLIVER MORTON,
Defendant

ACTION FOR BREACH OF CONTRACT

NOT FOR PUBLICATION

APPEARANCES:
GEORGE W. CANNON, Esq.
Law Offices of George W. Cannon, Jr.
P.O. Box 1548
Frederiksted, St. Croix U.S. Virgin Islands 00841
(Attorney for Plaintiffs)

EDWARD HASKINS JACOBS, Esq.
Jacobs & Brady
7 Church Street
Christiansted, St. Croix U.S. Virgin Islands 00820
(Attorney for Defendant)

CABRET, Judge

MEMORANDUM OPINION
(Filed: April 14,1999)

THIS MATTER came for trial before this Court on January 25, May 16, May 31, June 3, June 10, June 11, and November 13, 1996. The Plaintiffs seek damages against the Defendant for alleged breaches of two reconstruction and repair contracts that the parties allegedly entered into concerning two houses on Plots 22-B and 37 Estate Rattan. Defendant generally denies all allegations and counterclaims that he is entitled to further payment from the Plaintiffs for the construction work under the legal principles of quantum meruit, unjust enrichment, and restitution. The issues to be determined by this Court are;

(1) Whether a contract existed between the parties regarding reconstruction and repair work at Plots No. 22-B and 37 Rattan;

(2) If so, whether Defendant breached the parties' contracts;

(3) If so, whether Defendant's breaches were material, thereby discharging Plaintiffs' obligation to compensate Defendant;

(4) The amount of damages, if any, to which Plaintiffs are entitled; and

(5) Whether Defendant is entitled to restitution.

STATEMENT OF FACTS

The Plaintiffs, Abraham and Doreen Hewitt, are an elderly married couple who own and principally reside at Estate No. 37 Rattan ("Plot 37"). They also own Estate No. 22-B Rattan ("Plot 22-B") which serves as a

rental home. In September of 1989, the houses located on both plots suffered extensive damage during Hurricane Hugo. Both houses were insured but Plaintiffs' insurance company went bankrupt shortly after the passage of Hurricane Hugo. As a result of insufficient insurance funds to do post-Hurricane Hugo reconstruction work, Plaintiffs went to the Small Business Administration Office ("SBA") to obtain a loan for the purpose of reconstructing both their houses. Mr. Hewitt testified that he wanted to do the reconstruction work himself but SBA required somebody with a license to do the work.

After talking to several other contractors, Mr. Hewitt approached Defendant to find out if he had a construction license. At this time, Defendant was engaged in post-Hugo construction work on the house of Ms. Alberta Akin, Mr. Hewitt's sister. Upon learning that Defendant was a licensed repair and maintenance contractor, Mr. Hewitt asked Defendant to give him estimates for the repair of the houses on Plots No. 22-B and 37.

Pursuant to the Defendant's instructions, Jennifer Morton, Defendant's wife, prepared a handwritten estimate for each property, dated October 12, 1989. The estimate for the house on Plot 37 was $80,000fn1 and the estimate for the house on Plot 22-B was $75,000. fn2

The Defendant gave the Plaintiffs the handwritten estimates. Mrs. Hewitt then took the estimates to SBA in order to get the $10,000 down payment on their loan. Mrs. Hewitt testified that SBA found the estimates to be insufficient and required that they be typewritten and in a certain format.fn3 Plaintiffs subsequently told

Defendant what was required by SBA and Mr. Hewitt gave Defendant a handwritten document allegedly done in cursive as well as a form that one of the subcontractors did through SBA for his brother Albert Hewittfn4 so the Defendant could get an idea of what the final documents should look like. Defendant, in turn, gave the documents along with his handwritten estimates to his wife so she could get the documents typed by a professional secretary. Once the formal documents were typedfn5, Defendant took the copiesfn6 to Plaintiffs at their home. Plaintiffs allege that the Defendant signed both documents in front of them. However, Defendant claims that he never signed the documentsfn7 and never entered into any written contracts for the construction or reconstruction of the Plaintiffs' houses.

After obtaining the typed documents, Plaintiffs took them to SBA. SBA authorized a loan in the amount of $77,600fn8 for the house at Plot 37 and $34,900fn9 for the house at Plot 22-B. Upon receiving the first check of $10,000 for the work at Plot 37 from SBA, the Plaintiffs went to Defendant while he was working at the home of Alberta Akins, Mr. Hewitt's sister, and gave him the $10,000 check, Defendant took the check and placed it in his truck. Plaintiffs claim that Defendant signed a receipt for the check. However, Defendant denies signing any type of receipt.

Sometime in June of 1990, Defendant began work on the house on Plot 37. Several months later, around October of 1990, Defendant started work on the house on Plot 22-B. Defendant allegedly completed his work at Plot 37 around November of 1991 and stopped working on Plot 22-B on or about March of 1992. The

house at Plot 22-B was about 75-85% complete when Defendant stopped working due to an alleged dispute with the Plaintiffs concerning the installation of certain tiles and windows. Upon leaving, Defendant locked the house at Plot 22-B and nailed a door to the garage and other areas. As a result, Plaintiffs were unable to gain access to the house for over a year until this Court ordered Defendant to return the keys to Plaintiffs in March, 1993.

From the time Defendant started work at Plot 37 until he quit working at Plot 22-B on or about March of 1992, the reconstruction process was beset by problems and disputes. The first problem Plaintiffs claim they encountered was Defendant's frequent absence from the worksite. Specifically, Plaintiffs claim that while Defendant was working at Plot 37, Defendant would work off and on and that sometimes he never showed up to work. Antonio Ayala, a worker who worked on Plaintiffs' property for the Defendant, corroborated Plaintiffs' allegations by testifying that Defendant was probably on the job about 50% of the time. Furthermore, Mr. Ayala, along with another of Defendant's workers, Roger Hector, testified that Defendant was working an at least three other jobs while working for the Plaintiffs. They also testified that they never submitted time sheets or kept records showing how long they were working on a particular property. In response to these allegations, Defendant claims that he had to work at other jobs to support himself since the Plaintiffs allegedly told him that they would not compensate him for the work until he was finished.

A second problem Plaintiffs claim they encountered

were numerous unauthorized changes made to the building structures by Defendant. Although Plaintiffs testified that they requested certain changes not originally contemplated by the parties, they argue that most of the extra work done by Defendant was not authorized by them. Furthermore, Plaintiffs testified that they specifically told the Defendant not to do any extra work unless he provided them with an estimate. Defendant, in turn, alleges that Plaintiffs were constantly requesting changes to the plans during the reconstruction process and that he either informed them of the changes or they authorized him to do so.

Another serious problem Plaintiffs claim they encountered was Defendant's constant refusal to provide them with itemized bills of his labor and material costs as well as estimates for any extra work, despite being asked on numerous occasions. Defendant's response is that during the reconstruction at Plot 37, he was required to turn over his receipts to SBA, which he did. Defendant says he attempted to present Plaintiffs with the receipts after SBA stopped requiring him to turn over the receipts to it, but Plaintiffs refused to accept them.

Plaintiffs claim they paid Defendant over $132,000 for work at Plot 37 and over $97,000 for work at Plot 22-B. When Defendant departed from Plot 22-B, Plaintiffs allege that they had to spend an additional $36, 000 to complete the job at Plot 22-B. Furthermore, Plaintiffs claim there were several structural problems with the house on Plot 37. As a result, Plaintiffs filed the instant action against Defendant for breach of contract and damages. Defendant, in turn, filed a counterclaim against Plaintiff's alleging he is entitled to further

payment from the Plaintiffs for the construction work under the legal principles of quantum meruit, unjust enrichment, and restitution.

## DISCUSSION

### I. A Contract Existed Among the Parties for the Construction of Plots 22-B and 37.

A building and construction contract, just as any other contract, must be based upon an offer and acceptance between two or more competent parties for sufficient consideration, and certainty is essential to the validity of such a contract. 13 Am. Jur. 2d Building and Construction Contracts § 1 (1964); See also Johnston the Florist v. Tedco Constr., 652 A.2d 511 (Pa. Super. 1995). To be binding, the terms of a contract must be reasonably certain so as to provide a basis for determining the existence of a breach and for giving an appropriate remedy. See Restatement (Second) of Contracts § 33 (1) and (2)(1981); Total Medical Management. Inc. v. United States., 104 F.3d 1314 (Fed. Cir. 1997); Haft v. Dart Group, 877 F.Supp. 896 (D.Del. 1995); and Dahar v. Grzandziel 599 A.2d 217 (Pa. Super. 1991). Once it is determined that the parties did indeed intend to create a contract, a court should be slow to deny enforcement on the basis of indefiniteness of the contract. Aviation Contractor Employees Inc. v. United States, 945 F.2d 1568, 1572 (Fed. Cir. 1991)(citing Corbin on Contracts § 97 (1963)).

Certain agreements must be evidenced by a writing signed by the party sought to be bound. Cf. 13 Am. Jur. 2d Building and Construction Contracts §3. A

construction contract, however, does not have to meet this requirement if it is possible that it will be performed within a year. Id. Moreover, the fact that the party sought to be bound has not signed the contract is not essential to the issue of liability under the contract. Id. Signing a building and construction contract is not necessary to render it binding when the terms of the contract are agreed upon and understood between the parties, and work is done pursuant to the terms of the contract. 13 Am. Jur. 2d Building and Construction Contracts § 3 and Girard Life Ins. Annuity & T.Co. v. Cooper, 162 U.S. 529 (1896); See also Mountain Fuel Supply v. Reliance Ins. Co., 933 F. 2d 882 (10th Cir. 1991)(One can become bound by contract without signing it if intent to accept contract has been demonstrated through other means) and Hershey Foods Corp. v. Ralph Chapek Inc., 828.,F.2d 989, 995 (3d Cir. 1987)(Correspondence may constitute a contract and it is not necessary for both parties to sign the writing if the parties, acting pursuant to its terms, evidence their acceptance). In such a case, performance is the only thing needed to complete the agreement and to create a binding promise. 17 C.J.S. Contracts § 41 (1963). To make performance of a thing proposed sufficient as an acceptance of the proposal, performance must have been induced by, and in accordance with, the proposal. Id.

In the case sub judice, the Plaintiffs present two documents they claim to be the construction contracts entered into with the Defendant for the repair of the houses on both Plots 22-B and 37. The alleged contract for Plot 37fn10, dated April 16, 1990, states in pertinent part:

SCOPE OF WORK

1. Replace, repair and paint all damaged walls, doors, etc.

2. Replace damaged roof.

3. Replace electrical, plumbing and repair other utilities.

4. Repair, replace structural or real property improvements (bathrooms, etc.).

5. Repair disaster-damaged windows.

6. Repair damaged windows.

7. Remove debris.

COST

Cost of all repairs is $80,000 to be paid as follows:

$10,000.00 upon the signing of this agreement.
$20,000.00 existing slab to bond beam.
$20,000.00 upon completion of roof
$20,000.00 upon completion of windows, floor tiles and doors.
$10,000.00 upon completion of entire job.

TIME. Work will commence two weeks after receipt of first installment. Job will be completed within ninety (90) working days thereafter.

The alleged contract for Plot 22-Bfn11, which is dated

April 26, 1990, states in pertinent part:

SCOPE OF WORK

1. Fully reconstruct disaster-destroyed real estate (dwelling).
2. Clean cistern and repaint.
3. Demolish and rebuild front stairway.
4. Remove debris.

COST

Cost of all repairs is $75,000, to be paid as follows:

$10,000.00 upon the signing of this agreement.
$20,000.00 existing slab to bond beam.
$20,000.00 upon completion of roof
$20,000.00 upon completion of windows, floor tiles and doors.
$5,000.00 upon completion of entire job.

TIME. Work will commence two weeks after receipt of first installment. Job will be completed within ninety (90) working days thereafter.

The trial testimony establishes that both of these documents were formally prepared by the Defendant in accordance with his handwritten estimates and some other documents handed to him by the Plaintiffs. Plaintiffs claim both alleged contracts were signed in the presence of all the parties. Defendant, however, denies that he ever signed the documents before the Plaintiffs. Both alleged contracts contain the signatures of all the parties.

A review of the trial testimony and submitted documents mandates the finding that Plaintiffs' Exhibits No. 1 and 2 constitute express contracts validly entered into by the parties for the repair and reconstruction work at Plots 22-B and 37. Although the Defendant denies that he ever signed the documents in front of the Plaintiffs, thus implying that the purported signatures are forgeries, Defendant's mere denial of the genuineness of his signature is simply insufficient for this Court to conclude that his signatures are not on both contracts. See C.J.S. Signatures § 8 (Denial of the genuineness of a signature by a subscribing witness is not conclusive evidence that the signature is not genuine or sufficient, and a question of fact remains as to whether or not the signature is genuine or sufficient). Without sufficient evidence to support Defendant's denial that his signatures are on the contracts, this Court cannot accord much weight to Defendant's testimony.

Moreover, even if the purported signatures on Plaintiffs' Exhibit Nos. 1 and 2 were not those of the Defendant, Defendant did not have to sign the contracts to render them binding upon him so long as he performed the contemplated work according to the contracts. Once again, the record in this matter clearly demonstrates that such was the case. First, Carl Christensen, an official from SBA testified that no loan obtained from SBA over the amount of $25,000 could be approved or disbursed unless it received a formal construction contract signed by the parties. Second, Defendant admitted preparing the documents produced by Plaintiffs for the purpose of allowing Plaintiffs to get the $10,000 loan installment from SBA. Third, Defendant accepted the $10,000 loan payment from

Plaintiffs and began reconstruction work at Plot 37 several weeks thereafter in accordance with the terms of Plaintiffs' written agreement. Specifically, Defendant replaced the roof, made structural improvements to the house, and replaced damaged windows and doors. Fourth, Plaintiffs made their scheduled payments to the Defendant in accordance with the agreement. Additionally, virtually the same scenario was repeated on the Plot 22-B agreement. When Defendant received the $10,000 payment for reconstruction work at Plot 22-B, he eventually began the work on the property according to the terms of the parties' written agreement. In light of these undisputed facts, this Court finds that the Defendant's acceptance of the $10,000 down payment and his subsequent work on both properties are sufficient evidence to create a binding express contract among the parties for the repair and reconstruction o£ the houses on Plots 22-B and 37.

II. The Construction Contracts Were Breached By Defendant

Having determined that contracts for the reconstruction of the houses on Plots 22-B and 37 existed between the parties, the next issue to be addressed is whether Defendant breached the contracts. A contractor's liability is fixed by the terms of his contract, and he is obligated to perform according to those terms. 13 Am. Jur. 2d Building and Construction Contracts § 27 and 17A C.J.S. Contract § 494(2); See also Whitfield Constr. Co., Inc. v. Community Dev. Corp., 392 F.Supp. 982 (D.V.I. 1975). In the absence of special provisions in the contract, the contractor's obligations end upon the completion of the

structure in accordance with the terms of the contract. 13 Am. Jur. 2d Building and Construction Contracts § 27. Where a party to a building or construction contract fails to comply with the duty imposed by the terms of the contract, a breach results for which an action may be maintained to recover the damages sustained thereby. 13, Am. Jur. 2d Building and Construction Contracts § 72; See also Restatement (Second) of Contracts §235(2)(When performance of a duty under a contract is due any non-performance is a breach). One who has contracted to construct a specified product can commit a breach of his contract either by delay in completion or defective construction or by repudiation and abandonment. 5 Corbin on Contracts § 1089 (1964).

Furthermore, "[I]t is well settled that in building, or construction contracts, whenever someone holds himself out to be specially qualified to do a particular type o£ work, there is an implied warranty that the work will be done in a workmanlike manner, and that the resulting building, product, etc. will be reasonably fit for its intended use. . . ." Raimer v. Stout, 14 V.I. 568, 579 (Terr. Ct. 1978)(citing Lewis v. Anchorage Asphalt Paving Co.. 535 P.2d 1188, 1196 (Alaska 1975).

A. Plot 37

With regard to Plot 37, Plaintiffs allege that Defendant breached the respective construction contract by (1) delaying the job and (2) failing to perform the work according to the contract.

1. Job Delay

The Plot 37 contract states that once work on the

property commenced, "the job will be completed within ninety (90) working days thereafter." However, Defendant worked at Plot 37 for a period of almost 17 months. Plaintiffs allege that one of the reasons for the delay was Defendant's frequent absence from the job site. Plaintiffs claim that they were at Plot 37 every day from about 10:00 a.m. to 2:00 p.m. and that the Defendant sometimes never showed up to work or would only leave a few men at the place without any supervision. Plaintiffs further claim that they questioned Defendant several times about the time he was taking off from work and that SBA was writing them asking why the work was not getting done and the house not yet completed.

Defendant provides several explanations for the time it took to complete the job at Plot 37. First, Defendant argues that the 90-day reconstruction period contemplated rebuilding the structure on Plot 37 as a wooden (prefabricated) structure, the way it originally existed. Defendant claims, however, that right before he began construction, Plaintiffs decided they wanted the house rebuilt as a concrete block structure, which required more time, materials, and labor. Second, Defendant argues that it took longer than expected to complete the work at Plot 37 because of the many changes Plaintiffs requested during the reconstruction process. Specifically, Defendant claims that Plaintiff's requested the following changes: (1) a change in the roof structure; (2) an addition or extension to the back o£ the house; (3) enclosing of the back porch; (4) combining two bathrooms into one and building an additional small bathroom; (5) digging a foundation for the outside pump; and (6) building a six-inch concrete block wall on the inside of a four inch concrete block

wall previously built by Abraham Hewitt. Third, Defendant disputes Plaintiffs' claim that he was frequently absent from the jobsite. He claims that he was on the jobsite about 80-85% of the time or about 60 to 65 hours a week. Defendant also claims that when he was not present at Plot 37, he was picking up materials, which was difficult to do after the hurricane. Finally, Defendant admits that he was working on other properties at the same time he was working on Plaintiffs' property. However, he claims he was only working on one or two other houses and that he maybe had about one or two of his workers working on other properties for no more than an hour at the most.

Provisions as to time in building and construction contracts are to be construed to give effect to the intention of the parties as shown by the language employed, which, in case of ambiguity, is to be considered in connection with the subject matter of the contract, the surrounding circumstances, and the practical construction, if any, given by the parties. 17A C.J.S. Contracts § 360 (1963); See also Central Coast Constr. v. Lincoln-Way Corp., 404 F.2d 1039 (10th Cir. 1968). Where a construction contract is to be performed "by" a particular time, it must be performed before such time. 17A C.J.S. Contracts § 360; A.A. & E.B. Jones Co. v. Boucher, 530 P.2d 974 (Col.Ct.App. 1975); and M.F.G. Trading. Co. v. Jensen, 107 S.E.2d 441 (Va.Sup.Ct.App. 1959). However, as a general rule, if a contractor agrees to do certain work within a specified time, and he is prevented from performing the contract by the act or default of the other party, the delay thus occasioned is excused. 13 Am. Jur. 2d Building and Construction Contracts § 48. In such a case, courts have held that the stipulation as to the time for completion becomes

inoperative, and the contractor is entitled to a reasonable time to complete the work. Hood v. Meininger 105 A.2d 126, 129 (Pa. 1954).

Furthermore, an owner may waive or extend the time within which a building contract is to be performed by the contractor. Ryan v. Thurmond, 481 S.W.2d 199, 206 (Tex.Civ.App. 1972). The waiver or extension may be implied as well as express; and what acts or omissions will constitute a waiver depends on their nature and circumstances of the case. Id (citing 17A C.J.S. Contracts § 506(2)(a)). Thus, an owner waives the delay when he either (1) makes payments to the contractor after expiration of the stipulated time for completion of the work, fn12 (2) assents to the continuance of the work after the time for the completion of the work has expired,fn13 or (3) accepts and pays for the work without objection,fn14 The effect of an extension or waiver of time for performance is merely to substitute a new time for the old; it does not affect the other provisions of the contract; and where the agreement for extension or waiver is silent as to the duration of the extension, the law implies that it shall be for a reasonable time. Ryan, 481 S.W.2d at 206 (citing 17A C.J.S. Contracts 506(2)(b)); See also Cotton v. Deasey. 766 S.W.2d 874 (Tex.App. 1989) and United Pac. Ins. Co. v. Collins, 389 S.W.2d 242, 244 (Ky. 1965). However, the mere fact that the owner permits the contractor to continue the work after the time of performance, as far as concerns the right of the contractor to recover on the contract, has been held not to waive the owner's right to recover damages for the delay in performance. 17A C.J.S. Contracts § 506(2)(b); See also Elkins Manor Assoc.s v. Eleanor Concrete Works. Inc.. 396 S.E.2d 463 (W.Va. 1990); May v.

Martin, 137 S.E.2d 860, 865 (Va. 1964); and Western Irr. Co. v. Reeves County Land, 233 S.W.2d 599, 602 (Tex.Civ.App. 1950). Thus, in the absence of a "time is of the essence" provision in the contract, a mere failure to complete the work within the specified time does not ipso facto terminate the contract, but only subjects the contractor to damages for the delay. See 13 Am. Jur. 2d Building and Construction Contracts § 47; Barnard-Curtiss Co. v. United States, 257 F.2d 565, S68 (10th Cir. 1958); DeSombre v. Bickel, 118 N.W.2d 868, 871 (Wis. 1963).

In the case sub judice, the Plot 37 contract contained a provision fixing the time for completion o£ work within 90 days once work began. However, there is a dispute among the parties as to whether the house on Plot 37 was to be rebuilt in concrete, as Plaintiffs posit, or in wood, as Defendant claims. Having carefully considered the evidence, this Court finds that the parties originally contemplated rebuilding the Plot 37 house in concrete. Plaintiffs were adamant at trial that they told Defendant that they wanted both houses to be rebuilt in concrete before entering into the contracts. Furthermore, Abraham Hewitt testified several times that the inclusion of the term "bond beam" in the Plot 37 contract meant that the whole house was going to be rebuilt in concrete block. This testimony was corroborated by the Defendant when he admitted in Court that a "bond beam" would be used in a concrete clock structure while a wooden structure does not need a "bond beam" but rather a "main beam." Additionally, the Court notes that Defendant previously included a 90-day completion period provision in an unrelated contract to repair and reconstruct a concrete block house.fn15 Finally, Defendant was unable to state for

certain at trial when the Plaintiffs requested to change the house to concrete block. Considering these facts, this Court concludes that the Plot 37 contract contemplated a concrete block structure.

However, regardless whether the parties originally contemplated the structure being rebuilt as a concrete structure, it is clear from the trial testimony that Plaintiffs requested additional changes to the house on Plot 37 during the reconstruction process.fn16 There is no question that these requested changes required more time for completion. Furthermore, the Plaintiffs continued to pay the Defendant after the expiration of the 90-day time period. Thus, in the absence of a "time is of the essence" provision in the Plot 37 contract, this Court must find that the Plaintiffs, by requesting alterations to the original plans and continuing to make payments to the Defendant, extended or excused the 90-day completion period. Thus, Defendant, after the expiration of 90 days, was entitled to a reasonable time to complete the work at Plot 37.

The question then becomes what would have been a reasonable time period for Defendant to complete the work at Plot 37. Larry French, Plaintiffs' expert, and Taylor Babb, Defendant's expert, both testified that the Plot 37 job should have been reasonably completed within nine to twelve months. Furthermore, two of the workers employed by the Defendant for the Hewitts' job, Antonio Ayala and Roger Hector, corroborated Abraham Hewitt's testimony that Defendant was frequently absent from the jobsite and that Defendant had them working on at least three other construction jobs while they were working at the Hewitts' property. Thus, although Plaintiffs requested and authorized all

the numerous changes alleged by the Defendant, he still exceeded the reasonable time for completion by five months. Accordingly, Plaintiffs are entitled to damages, if any, as a result of Defendant's unreasonable delay.

2. Failure to Perform Work in Accordance with the Contracts

The Plaintiffs also allege that the Defendant failed to perform the work at Plot 37 according to the contract. Specifically, Plaintiffs claim that Defendant placed the rafters on the roof unevenly in that some are 20 to 30 inches apart instead of 32 inches. fn17 Plaintiffs further claim that Defendant made numerous changes to the house without authorization. The only authorizations Plaintiffs claim they authorized were a change in the style of the roof, to enclose the back porch, and to build an addition to the back of the house (a small bathroom and a pantry). fn18 Plaintiffs finally claim that they did not authorize Defendant to raise the height of the house by two feet.

In response, Defendant argues that the Plaintiffs made numerous changes to the design of the house on Plot 37 once he began work. These changes include: (1) a change in the roof structure; (2) an addition or extension to the back of the house; (3) enclosing of the back porch; (4) combining two bathrooms into one and building an additional small bathroom; (6) digging a foundation for the outside pump; and (6) building a six-inch concrete block wall on the inside of a four-inch concrete block wall previously built by Abraham Hewitt.fn19 Furthermore, Defendant claims that he had to raise the height of the house as a result of building the new addition in the back of the house,

which in essence, widened the house. Thus, the walls had to be higher in order to maintain the pitch of the roof. Defendant alleges he informed Plaintiffs about this change and they agreed.

In interpreting a contract, effect must be given to the intention of the parties as gathered from a consideration of the entire contract. 13 Am. Jur. 2d Building and Construction Contracts § 8. Words and other conduct [of the parties] are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight. Restatement (Second) of Contracts § 202(1)(1981). In interpreting the words and conduct of the parties to a contract, a court must put itself in the position they occupied at the time the contract was made. Id., cmt.b.

The contractor and owner, may, by subsequent agreement, modify the original contract and authorize or require deviations and departures therefrom. 17A C.J.S. Contracts § 373; See also Freeman v. Stanbern Constr. Co., 106 A.2d 50, 54 (Md. 1954). However, the contractor is not justified without the consent of the owner, express or implied, in departing from the requirements of the contract. 17A C.J.S. Contracts § 373. Once a building is being constructed, and additions or alterations are made, the original contract, unless it is so entirely abandoned that it is impossible to trace to the part of the work it applies, is held to exist and to be binding on the parties so far as it can be followed. 13 Am Jur. 2d Building & Construction Contracts § 4; See also 17A C.J.S. Contracts § 373 and Hoffman v. Cook, 315 A.2d 551 (Md.Ct.Spec.App. 1974). The additions or alterations, if the expense of the work is thereby

increased, may be the subject of a new contract, either express or implied, but they do not affect the original contract, which still remains in force. 13 Am. Jur. 2d Building & Construction Contracts § 4.

In the case sub judice, trial testimony established that the scope of the Plot 37 contract is somewhat general in nature.fn20 Although the contract does not provide specific details as to what was to be done and who was to provide what, the circumstances of this case, as well as the contract, clearly reveal that the Defendant was to perform various repair and reconstruction work on the house at Plot 37 and that the Plaintiffs would provide specific payments upon the occurrence of certain events. Furthermore, the trial testimony established that before Defendant began working at Plot 37, the parties contemplated the reconstruction of Plaintiffs' home as it was originally built with the exceptions of a change in the roof structure and the use of concrete block instead of wood for the walls.

A review of the casefile reveals that the Defendant breached the Plot 37 contract when he improperly laid out the roof.fn21 Although Defendant claims that he informed Plaintiffs about the mistake and that they told him not to worry about it, it is clear to this Court that such was not the case.fn22 Furthermore, Defendant impliedly warranted that the work would be done in a workmanlike manner and it was incumbent upon him to take any necessary steps to remedy the defects that he created. Accordingly, Plaintiffs are entitled to recover damages, if any, resulting from the improperly laid out roof.

Regarding alleged changes either requested or

authorized by the Plaintiffs, this Court finds that the Plaintiffs solely requested or authorized the porch enclosure and the back addition up to a certain length. Although the Court sees the logic of Defendant's explanation that the 50-feet long by 10 foot wide addition would essentially widen the house necessitating the walls being raised in order to maintain the pitch of the roof, the Court finds that Plaintiffs never authorized Defendant to extend the addition as far as he did. Defendant, by his own admission, testified that the wall was not supposed to go as far east as it did. Furthermore, the Court credits the testimony of Abraham Hewitt where he testified that he complained to the Defendant about the wall being raised too high and that Defendant assured him the wall would not be too high. Finally, it was incumbent upon Defendant to notify and get authorization from the Plaintiffs regarding these changes. The Court finds that Defendant did not do so since he testified at his April 1994 deposition that he never got authorization from the Plaintiffs to raise the height of the wall.fn23 Defendant also testified at his 1994 deposition that he never wrote down what changes were made to the house and how much these changes cost. For the foregoing reasons, the Court finds that Defendant also breached the Plot 37 contract when he made unauthorized changes to the house. Accordingly, Plaintiffs are entitled to damages, if any, as a consequence of Defendant's breach. However, Defendant is entitled to compensation for any extra work requested by the Plaintiffs during the reconstruction process, specifically, the back addition and the porch enclosure.

B. Defendant Breached the Plot 22-B Contract

With regard to the reconstruction work on the house at Plot 22-B, Plaintiffs claim in their complaint that Defendant breached the contract by: (1) intermittently abandoning the job, (2) delaying the job, and (3) failing to perform the work in accordance with the written contract entered into by and between the parties. Defendant began work at Plot 22-B Rattan in October 1990 and left in February 1992. Defendant admits that the job was not completed when he left or quit. Defendant allegedly left the job as a result o£ a dispute with the Plaintiffs regarding the installation of certain tiles and windows. However, before quitting the job, Defendant nailed boards to the garage and other areas and padlocked the door, thus preventing the Plaintiffs from entering the house. Despite several requests from Plaintiffs to remove the barricades, Plaintiffs were unable to gain access into the house until April 1993 when the Court ordered Defendant to return the keys to Plaintiffs. Defendant claims he locked the house to secure the materials he bought which were still inside. Once the Plaintiffs gained access to the house at Plot 22-B, they allegedly spent $36,585.13 to complete the remaining reconstruction work.

There is no question that Defendant breached the contract for the reconstruction job at Plot 22-B. Defendant, by his own admission, agrees that the job at Plot 22-B was not completed when he quit the job in February of 1992. Furthermore, Defendant provided no justifiable explanation for his abandonment of the Plot 22-B job. The fact that he was involved in a disagreement or dispute with the Plaintiffs over the purchase and installation of certain windows and tiles cannot justify his outright abandonment of any further work at Plot 22-B.

Finally, the Court also finds that the Defendant was responsible for several structural problems to the house at Plot 22-B. First, Plaintiffs' expert, Larry French, testified that the tiles in the living room, dining room and kitchen were improperly laid out. Mr. French testified that normally all construction is out-of-square by either a one-half inch or one inch, but he found that the tiles were out of square by nearly nine inches and the improper layout is clearly visible. Second, Abraham Hewitt testified that the Defendant built a wall against the front steps of the house without Plaintiffs' authorization. Although Defendant testified that he had authorization to build the wall from the Plaintiffs, this testimony is inconsistent with Defendant's prior deposition testimony where Defendant first testified that he chose to build the wall against the steps since there was no plan. Finally, Abraham Hewitt testified that when the Plaintiffs finally obtained access to the house at Plot 22-B after receiving the keys from Defendant, they discovered that Defendant had applied only one layer of roof coating. Mr. Hewitt testified that the roof required at least three coatings. Based upon the foregoing evidence, the Court finds that Defendant breached the Plot 22-B contract and that Plaintiffs are therefore entitled damages, if any, for the structural defects created by the Defendant with regard to the house at Plot 22-B.

III. Defendant's Breaches Were Material

Having determined that Defendant breached both the Plot 22-B and Plot 37 contracts, the Court must now decide whether the breaches were material. The standard of materiality applies to contracts of all types. Restatement (Second) of Contracts §241 cmt. a. A

condition to rendering performance under a contract is that there be no uncured material breach by the other party to the contract. Restatement (Second) of Contracts §237. A material breach of contract, whether for defective performance or for the failure to perform, operates to either prevent the nonbreaching party's duty to perform from arising, at least temporarily, or to discharge that duty if the breach has not been cured during the time in which performance can occur. Restatement (Second) of Contracts §237 cmt. a. In construction contracts, it is common to state the issue of "uncured material breach" as whether there has been "substantial performance." Restatement (Second) of Contracts § 237 cmt. d. Substantial performance of a contract occurs where there is performance of all the essentials necessary to accomplish the purpose of the contract. 13 Am. Jur. 2d Building and Construction Contracts §43. If there has been substantial performance, there is no material breach. Restatement (Second) of Contracts §237 cmt. d. The contractor may claim any unpaid balance due him under the contract, and the property owner may counterclaim for damages for any defects. Id On the other hand, if there has not been substantial performance, a material breach has occurred, and the consequences are more severe. Id First, the nonbreaching party may treat the contract as at an end, discharging any duty of counterperformance. Id Second, the nonbreaching party has an immediate right to all remedies for breach of contract, including total damages. Id Third, the contractor has no claim under the contract. Restatement (Second) of Contracts §237 cmt. d. However, he may claim restitution for his services. Id.

The considerations in determining whether

performance is substantial are the same as those for determining whether a breach is material. Id. These considerations are:

(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;

(b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;

(c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;

(d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; and

(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Restatement (Second) of Contracts § 241.

There is no question that the work at Plot 37 was not substantially performed by Defendant and that he materially breached the contract. Both parties presented expert testimony that the Plot 37 job reasonably should have taken 9 to 12 months to complete. However, Defendant delayed performance under the contract by five months when the contract called for completion within 90 days of its execution. Defendant also unevenly placed the roof rafters 20 to 30 inches apart when the industry standard placement is

32 inches. Moreover, Defendant admitted that he overextended the addition to the back of the house which, in turn, required him to raise the height of the walls by two feet to maintain the pitch of the roof. Further, Defendant never kept track of the changes made to the house or how much the changes cost.

Similarly, the Court finds there was no substantial performance of the work at Plot 22-B and Defendant materially breached this contract as well. As discussed in the previous section, Defendant himself was responsible for numerous structural or design defects in the house. There is clear evidence that floor tiles throughout the living room, dining room, and kitchen were visibly out of square by nine inches when the acceptable standard of deviation within the construction industry is only one-half to one inch. Additionally, Defendant built a wall against the front steps of the home without the Plaintiffs' authorization. Moreover, the Defendant only applied one layer of roof coating instead of at least three coatings as required. Finally, Defendant abandoned the job at Plot 22-B without adequate justification after almost one and a half years when the structure was only 75 to 85 percent complete.

Substantial performance of a contract occurs where there is performance of all the essentials necessary to accomplish the purpose of the contract. 13 Am. Jur. Building and Construction Contracts §43. Clearly there was no substantial performance of any of the contracts. Plaintiffs had a reasonable expectation that the repair and reconstruction of the structures on Plots 22-B and 37 would be timely performed in good faith and in a workmanlike manner. For the reasons discussed above,

the Court finds that the Plaintiffs did not receive substantial performance from Defendant and that Defendant materially breached the contracts for construction services at Plots 22-B and 37. Accordingly, Plaintiffs are therefore entitled to total damages under the contract.

## IV. Damages

Having found the Defendant materially breached both the Plot 22-B and Plot 37 contracts, the Court now turns to Plaintiffs' claims for damages. Every injured party has a right to damages for any breach by a party against whom the contract is enforceable unless the claim for damages has been suspended or discharged. Restatement (Second) of Contracts § 346(1)(1981). One suing for breach of contract must establish his losses with some degree of reasonable certainty to be entitled to recovery. Raimer v. Stout, 14 V.I. 568, 590 (Terr.Ct. 1978)(citing Restatement (Second) of Contracts § 331). "If the breach caused no loss or if the amount of the loss is not proved . . . , a small sum fixed without regard to the amount of loss will be awarded as nominal damages." Restatement (Second) of Contracts § 346(2); See also Cover v. Island Cars of St. Croix, 18 V.I. 156 (Terr.Ct. 1982).

Contract damages are ordinarily based on the injured party's expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed. Restatement (Second) of Contracts §347, cmt.a; See also Christmas v. Virgin in Islands Water & Power Auth., 18 V.I. 624 (D.V.I 1981).

For breach due to defective performance or due to abandonment of the contract, an injured party can get a judgment for damages measured by the reasonable cost of reconstruction and completion in accordance with the contract, so long as this is possible and does not involve unreasonable economic waste. See 13 Am Jur 2d Building & Construction Contracts §80 and 5 Corbin on Contracts § 1089 (1964)(emphasis supplied); See also Sheldon v. Northeast Developers, Inc., 238 A.2d 775 (Vt. 1968) and Cooper Concrete Co. v. Hendricks, 386 S.W.2d 221 (Tex. Civ.App. 1965).fn24 The amount actually paid by the owner to another contractor for correction and completion in accordance with the contract is a measure of damages for the Defendant's breach. 5 Corbin on Contracts § 1089; See also Dierickx v. Vulcan Industries, 158 N.W.2d 778 (Mich.Ct.App. 1968). If it is made to appear that physical reconstruction and completion in accordance with the contract will involve unreasonable economic waste by destruction of usable property or otherwise, the damages awarded for the contractor's breach of contract will be measured by the difference between the market value that the structure contracted for would have had and that of the imperfect structure received by the Plaintiffs. 5 Corbin on Contracts § 1090; See also Restatement (Second) of Contracts § 348(2); Vezina v. Nautilus Pools, Inc, 610 A.2d 1312 (Conn.App.Ct. 1997); Oelschlegel v. Mutual Real Est. Inv. Trust, 633 A.2d 181 (Pa.Super. 1993), appeal denied 651 A.2d 540; Bayuk v. Edson, 46 Cal Rptr 49, 54 (Cal.DIst.Ct.App, 1965);fn26 and Worthen Bank & Trust v. Silvercool Serv., 687 P.2d 464, 467 (Colo.Ct.App. 1984).fn27

Finally, where there is an express stipulation as to the

amount of compensation and there has been full performance by the contractor, such stipulation is conclusive on the parties, and measures the amount of recovery for performance, irrespective of whether the cost of performance exceeded the amount stipulated. 17 C.J.S. Contracts §§ 361 and 367(1); See also 13 Am Jur 2d Building and Construction Contracts § 18fn28 and Gutmacher v. H & J Constr. Co., 419 P.2d 525 (Ariz. 1966). Furthermore, if a building and construction contract is fairly entered into by an experienced builder, the fact that a portion of the work proves to be more expensive than was estimated does not entitle the builder, in the absence of fraud or mistake, to any allowance beyond the contract price. 17 C.J.S. Contracts § 367(1)(cited in Knight Bros., Inc. v. State, 199 N.W.2d 724, 727 (Neb. 1972)).

A. Plot 37

Turning to the case at hand, the contract price for the work at Plot 37 was $80,000. However, the Plaintiffs have provided checks totaling $126,500 which they allege were paid to Defendant for the reconstruction of the house at Plot 37. Plaintiffs also claim that they purchased $15,701.59 fn29 worth of materials with the understanding that Defendant would pay 50% of the costs of those items included in his estimate. According to Plaintiffs, Defendant determined only $11,000 of these material costs were included in his estimate and agreed to reimburse them for 50% of those costs, or $5,500. Thus, Plaintiffs allege that Defendant has received the total amount of $126,500 for his performance on the Plot 37 contract and owes them $5,500 as reimbursement for materials they purchased. However, despite the alleged agreement between the

parties to split the costs of materials, the Plaintiffs are seeking to recover as compensatory damages the entire amount of $15,701.59 they claimed they spent on materials for the work at Plot 37 and as well as the amount of $8,757.92 incurred for materials used in the unauthorized construction of an additional two feet of interior wall.

1. The Original Contract

There is little dispute that the contract for Plot 37 was not substantially performed by the Defendant. Defendant committed several material breaches to the original contract. Specifically, Defendant unreasonably delayed performance of the contract, and he defectively laid out of the roof.

Regarding the delay, the proper measure of damages for a Defendant's wrongful delay in the performance of a contract is the loss resulting from the delay. 25 C.J.S. Damages §77 (1966). Ordinarily, under a building construction contract, in the absence of a stipulation in the contract, the rental value or value of the use of the property, less the expenses of maintaining the building, will be the measure of damages unless it clearly appears that the owner could not, during the delay, have rented the building, or the building was constructed for sale only and was sold for the price originally fixed although at a later date. Id. In the case sub judice, the Plaintiffs have presented no evidence as to any loss that they sustained as a result of Defendant's unreasonable delay in the performance of the Plot 37 contract. Specifically, Plaintiffs have presented no testimony as to the rental value or value of use of the house at Plot 37 or that it was their

intention to sell the house. To the contrary, Plaintiffs continued to reside at Plot 37. If the breach caused no loss, or if the amount of the loss is not proved, a small sum fixed without regard to the amount of loss will be awarded as nominal damages. Restatement (Second) of Contracts § 346(2). Because Plaintiffs have not proven actual loss of rental value or the value of the loss of use, the Court will award nominal damages in the sum of $1.00.

With regard to Defendant's improper layout of the roof, the proper measure of damages is ordinarily the reasonable cost of reconstruction and completion in accordance with the contract. However, Plaintiffs' expert, Larry French, testified that he did not prepare an estimate to correct the roof since it would be impractical to do so. Specifically, Mr. French testified that the whole roof would have to be taken off in order to correct the defective design and that the resulting cost would be too exorbitant and not economically feasible. Thus, the proper measure of damages in the instant matter becomes the diminution of market value due to the defects.

This Court, however, cannot determine loss of market value because the Plaintiffs failed to present the requisite evidence. Specifically, Plaintiffs presented no evidence of the present market value of the house with the improper layout design. Similarly, Plaintiffs presented no evidence of what the market value of the house would have been had the roof been constructed in a workmanlike manner. Again, since Plaintiffs have failed to prove actual loss of market value, this Court will award nominal damages for Defendant's defective performance in the sum of $ 1.00.

2. Extra Work or Modifications/Materials

A builder's right to compensation for additional, changed, or extra work depends on the existence of a valid contract, express or implied, as well as evidence that the contractor performed services, or furnished material, and did work outside of and in addition to the specifications agreed on, at an expense in excess of the contract price. 17A U.S. Contracts § 371(2). Furthermore, a contractor may recover the reasonable value of additional work necessitated by a material change of specifications. 13 Am Jur 2d Building and Construction Contracts § 19. However, there can be no recovery for extra work performed or materials supplied without the knowledge and consent of the adverse party. 17A C.J.S. Contracts § 364.

In the case sub judice, there is no dispute among the parties that Defendant was authorized, outside of the original contract, to extend the back of the house as well as to add a small bathroom at Plot 37. However, Plaintiffs never authorized Defendant to extend the building as far back east as he did nor to increase the height of the walls by two feet. Furthermore, Plaintiffs allege that despite several requests made to the Defendant to provide them with estimates for the additions, Defendant finally handed them a bill for $42,000 for the extra work performed only after the additions were about 90% complete. In response, Defendant admits that Plaintiffs made several requests for the estimates but that he did eventually provide them with a $20,000 to $30,000 estimate for both the extension and a $1,700 estimate for the small bathroom. However, Defendant also admitted at trial that he built the houses without explaining to the Plaintiffs what

they owed him or why they owed him.

Although the Defendant was entitled to compensation for work performed pursuant to Plaintiffs' request and knowledge, it appears to the Court that the Defendant received additional money for a portion of work performed without the express authorization from the Plaintiffs. However, one suing for breach of contract must establish his losses with some degree of reasonable certainty to be entitled to recovery. Raimer v. Stout, 14 V.I. 568, 590 (Terr.Ct. 1978)(citing Restatement (Second) of Contracts § 331). Furthermore, if the amount of the loss is not proved, a small sum fixed without regard to the amount of loss will be awarded as nominal damages, Restatement (Second) of Contracts § 346(2); See also Cover v. Island Cars of St. Croix, 18 V.I. 156 (Terr.Ct. 1982). The Court finds the Plaintiffs have failed to provide sufficient evidence that would allow the Court to determine the value of Defendant's extra work or to what amount Defendant was not entitled. Because Plaintiffs have failed to prove their actual losses on the unauthorized work, the Court will award nominal damages of $1.00.

Thus, the only remaining damages issue with regard to Plot 37 is whether the Plaintiffs are entitled to compensation of $15,701.59 for materials that they purchased out-of-pocket for the job at Plot 37 and as well as the amount of $8,757.92 for the additional materials used when Defendant raised the height of the building by two feet without authorization. The record reveals that Plaintiffs are entitled to recover the amount of $8,757.92 representing the cost for the additional two feet of interior wall. It is clear that

Plaintiffs never authorized Defendant to raise the height of the roof by two feet. To the contrary, Plaintiffs informed Defendant that the roof was going to be too high but Defendant assured them that such would not be the case. Since Plaintiffs actually incurred the cost of materials for the additional two feet of wall which was not contemplated by the parties, the Court will award the sum of $8,757.92 as damages.

Finally, regarding Plaintiffs' claim for their entire out-of-pocket costs of $15,701.59 for materials, the Court finds there is no basis for recovery of this amount. However, Plaintiffs did testify to an agreement between the parties in which Plaintiffs would purchase certain items so that they could get exactly what they wanted and Defendant would reimburse them for their purchases. According to Plaintiffs, Defendant agreed to reimburse 50 percent of the costs of those items already included in his estimate. Plaintiff's testified that under this agreement, Defendant determined only $11,000 in materials out of their total purchases of $15,701.59 were included in the contract. Thus, Plaintiffs alleged Defendant owes them $5,500, or 50 percent of $11,000. Although Plaintiffs admitted the agreement was never reduced to writing, the Court finds the evidence is unequivocal on the terms of the agreement. Accordingly, Plaintiffs shall recover $5,500 in compensatory damages for the cost of the materials they purchased.

B. Plot 22-B

The contract price for the work at Plot 22-B was $75,000. Plaintiffs have provided checks totaling $92,454.20 which they allege were paid to the Defendant for his work at Plot 22-B.fn30 Plaintiffs

further allege that after Defendant abandoned the job at Plot 22-B, they spent an additional $36,585.13 to complete the job.

In the case sub judice, Defendant, without justification, abandoned his job at Plot 22-B. The house at Plot 22-B was about 75-85% complete when Defendant quit, but Defendant received $92,454.20 for his services-nearly $17,454.20 more than the original contract price. Furthermore, the testimony at trial once again established that the Defendant made numerous changes to the house at Plot 22-B without any authorization from the Plaintiffs. However, the only damages Plaintiffs seek to recover is the sum of $36,585.13 representing the costs they incurred to complete the house at Plot 22-B plus lost rent for the period that Plaintiffs were unable to rent the house at Plot 22-B.

With regard to the Plaintiffs' claim for lost rent, the Court cannot award any such damages. Plaintiffs have provided no testimony whatsoever as to the rental value of the house at Plot 22-B.fn31 It was only during the closing argument that Plaintiffs' counsel stated that the Plaintiffs seek lost rent in the amount of $1,000 a month for the period running from July 1991 to March 1993, or a total of $21,000. However, unsworn statements from counsel are not evidence and this Court cannot determine damages based solely on the closing statements of an attorney.

With regard to Plaintiffs' claim for the recovery of $36,585.13 in costs to complete the house at Plot 22-B after Defendant abandoned the job, Plaintiffs have provided numerous receipts for materials and labor

which total only $20,469.18.fn32 In light of the rule that an injured property owner is entitled to recover reasonable actual costs for correction and completion of a construction contract, See 13 Am Jur 2d Building & Construction Contracts § 80 and 5 Corbin on Contracts § 1089 (1964), the Court will award Plaintiffs compensatory damages in the amount of $20,469,18.

The Plaintiffs also testified that they should be credited with the amount of $13,848fn33 for the value of their own labor at Plot 22-B. Plaintiffs placed the same value on their labor as Defendant placed upon his laborers. Since Plaintiffs provided sufficient evidence that their labor was used to complete the work at Plot 22-B, they shall be awarded compensatory damages of $13,848 for the value of their labor.

The Plaintiffs further seek to recover the sum of $4,506.47 representing out-of-pocket expenses for materials used during the reconstruction of Plot 22-B, However, Plaintiffs provided no evidence that they are entitled to recover this amount. Plaintiffs bear the burden of establishing their losses with some degree of reasonable certainty to be entitled to recovery. Raimer v. Stout, 14 V.I. 568, 590 (Terr.Ct. 1978)(citing Restatement (Second) of Contracts § 331). If Plaintiffs fail to meet the burden of proving such losses, a small sum fixed without regard to the amount of loss will be awarded as nominal damages. Restatement (Second) of Contracts § 346(2); See also Cover y. Island Cars of St. Croix, V.I. 156 (Tern. Ct. 1982). The Court finds the Plaintiffs have failed to provide sufficient evidence that would allow the Court to what amount Defendant was not entitled. Because Plaintiffs have failed to provide an adequate basis for the recovery of their material costs

incurred for the work at Plot 22-B, the Court will award nominal damages of $1.00.

V. Defendant's Counterclaim/Restitution

Although Defendant materially breached the construction contracts and is therefore precluded from seeking damages under the contract, Defendant may still recover for the value of his services under an equitable remedy. Restatement (Second) of Contracts § 237 cmt. d. In the absence of waiver or excuse, compensation payable on the completion of a contract is not recoverable where there has not been at least substantial performance of the contract. 17A C.J.S. Contracts § 367(6); See also Restatement (Second) of Contracts § 237, cmt. d. The contractor, however, may recover on a quantum meruit theory the reasonable value of the labor and materials furnished, if he has acted in good faith and the owner has retained the benefit of the partial performance, 17A C.J.S. Contracts § 367(6); See also Restatement (Second) of Contracts §§ 237, cmt. d and 370. This rule cannot be invoked where the failure to perform is wilful or intentional, or is due to carelessness, or unless the omission, though intentional, is due to a belief that performance in that respect is not required. 13 Am Jur 2d Building and Construction Contracts § 42; See also 17A U.S. Contract § 367(6)fn34 and Restatement (Second) of Contracts § 374. The measure of the builder's recovery for a partial performance, when entitled so to recover, is the reasonable value of the labor and materials having reference to the contract price, not to exceed the benefit received by the owner, and subject to a deduction of the amount of damages sustained by the owner by reason of the builder's failure fully to perform

the contract. 17A C.J.S. Contracts § 367(6); See also Restatement (Second) of Contracts § 371fn35 and Ventura v. Pearson, 19 V.I. 107 (Terr.Ct. 1980).fn36

At trial, Defendant's expert, Taylor Babb, testified that the fair market value for the work done by Defendant was $247,388 for the house at Plot 37 and $143,569 for the house at Plot 22-B. Accordingly, the Defendant seeks further payment from the Plaintiffs under the legal principles of quantum meruit, unjust enrichment, and restitution. However, the Court cannot accord much weight to Mr. Babb's testimony for several reasons. First, Mr. Babb is an engineer draftsman,, He does not build houses nor has he ever submitted a bid for the cost of building any particular type of building. Second, Mr. Babb testified that in determining the fair market value of Defendant's work, one would have to know what work was done, what building materials were purchased, and what labor was provided. Despite this testimony, Mr. Babb did not consider the materials and labor costs for which Plaintiffs paid, the time it took Defendant to build the houses, and the value of work done by the Plaintiffs themselves at both plots in making his determination of fair market value. Third, Mr. Babb's figures include the extra work Defendant performed on both properties without Plaintiffs' authorizations. Finally, with regard to Plot 22-B, Mr. Babb inspected the house in January 1996 after the Hewitts had put in numerous hours of labor along with thousands of dollars for out of pocket costs.

Except for Taylor Babb's testimony, Defendant provided no other credible evidence in support of his claim for restitution. Although Defendant has provided a spreadsheet of all of his original invoices, receipts, and

canceled checks, there is no formal attestation to the document and the spreadsheet just contains numbers without any references to a corresponding invoice, receipt or check.fn37 Furthermore, Defendant has testified that he cannot recall exactly how much money he received from the Plaintiffs for his work on both plots. Additionally, Defendant has provided no itemization of his material and labor costs nor did he keep timesheets of all of his employees. This Court therefore is without basis for awarding restitution damages for the value of Defendant's work at Plot 37 and Plot 22-B. Furthermore, even if Defendant had provided an adequate basis to recover the value of his services under the Plot 22-B contract, there can be no question that Defendant's abandonment of that job was intentional and without justification. Where the failure of the builder substantially to perform is willful and without justification, and the owner cannot avoid availing himself of the benefits of a partial performance, the builder is not entitled to any compensation for his partial performance on an equitable theory unless the contact is a divisible one. 17A C.J.S. Contracts § 367(6). Based upon the foregoing reasons, Defendant's counterclaim for restitution damages for the work at Plots 22-B and 37 is denied.

## CONCLUSION

Construction contracts existed between the parties for renovations and repair work at Plot Nos. 22-B and 37 Estate Rattan. The Defendant materially breached the contracts through his delayed performance and failure to perform the work in accordance with the terms of the contracts.

Because Plaintiffs sufficiently proved their actual losses with regard to the Plot 37 contract, Plaintiffs shall recover damages of $8,757.92 for the cost of the additional two feet of interior wall and $5,500.00 for out-of-pocket material expenses. However, Plaintiffs shall only be awarded nominal damages of $1.00 for Defendant's delayed performance, $1.00 for the improper layout of the roof, and $1.00 for Defendant's unauthorized work because they did not prove actual damages with regard to these claims.

With regard to the Plot 22-B contract, Plaintiffs shall recover damages of $20,469.18 for the costs of completion and $13,848.00 for the value of their labor. However, because they failed to provide an adequate basis for the recovery of their out-of-pocket expenses for materials, Plaintiffs shall be awarded nominal damages of $1.00. Furthermore, Plaintiffs shall recover nothing on their claim for lost rent since they failed to provide any evidence in support of this claim.

Finally, Defendant is precluded from recovering any unpaid balance under any of the contracts for renovations at Plot Nos. 22-B and 37 because he materially breached the contracts. Defendant is also precluded from recovering the value of his services at Plots 22-B and 37 under a restitution theory because he failed to provide an adequate basis for awarding such damages and because he intentionally and unjustifiably abandoned the job at Plot 22-B. Therefore, Defendant shall recover nothing for the value of his services.

DONE AND SO ORDERED this 14th day of April, 1999.

MARIA M. CABRET
Territorial Court Judge

ATTEST:
YVONNE V. WESSELHOFT
Clerk of the Court

By:
Deputy-Clerk

Dated: 4-15-99

Footnotes

fn1 See Plaintiffs' Exh. No. 6 and Defendant's Exh. No.20 which provides in pertinent part:

Estimate for work to be done due to storm damage.

(1) 3,040 sq. ft. of roofing to be replace with Tex. I-II and galvanize top.

(2) Replacement of missing rafters

(3) Replacement of three (3) damage windows.

(4) Replacement of damage doors as follows three (3) bed room, 2 baths, garage and back.

(5) Repairs of damage walls inside of house.

(6) Clothes closets to be restored to original.

(7) All electrical work to be rechecked.

(8) Complete inside of house to be repaint due to water stains.

(9) One (1) picture window to be replaced.

fn2 See Plaintiffs' Exh.No.7 and Defendant's Exh.No.19 which states in pertinent part:

(1) Total lost of property from floor slab. Upward consist of three (3) bed rooms, two (2) baths, living room, dining room, kitchen and others such as clothes closets storage spaces.

(2) Minor damages to first floor that can be also estimated.

(3) Floor space 1, 104 sq. ft.

(4) Building top section was prefab construction.

(5) Cleaning of cistern water supply.

fn3 Carl Christensen of SBA further testified that a construction contract signed by both parties is needed if the amount of the loan is over $25,000.

fn4 See Plaintiffs' Exh. No. 26.

fn5 See Defendant's Exh.No.21, typewritten estimate/contract for Plot 37 and Defendant's Exh. No. 22, typewritten estimate/contract for Plot 22-B.

fn6 See Plaintiffs' Exh.No.1, typewritten estimate/contract for Plot 37 and Plaintiffs' Exh. No. 2, typewritten estimate/contract for Plot 22-B.

fn7 Defendant alleges that he would never sign as a contract documents that lacked sufficient detail to inform him what he would need to do in order to perform under the document.

fn8 Plaintiffs subsequently requested and received a reduction in the loan from $77,600 to $65,000.

fn9 Plaintiff's subsequently requested and received a reduction in the loan from $34,900 to $10,000.

fn10 See Plaintiffs' Exhibit No.2

fn11 See Plaintiffs' Exhibit No. 1.

fn12 See Swink v. Smith, 113 N.W.2d 515, 517 (Neb. 1962).

fn13 See Ryan, 481 S. W.2d at 206; Oklahoma State Fair Exposition v. Lippert Bros., Inc., 243 F.2d 290, 292 (10th Cir. 1957)(When work is to be done by a time certain, employer, by allowing it to go on afterwards, thereby treating contract as still in force, waives materiality of time and can claim only such damages as he has sustained by reason of delay); and Jackson v. L.S. Brown Co., 71 S.E.2d 521 (Ga.Ct.App. 1952).

fn14 17A C.J.S. Contracts § 506(2)(a).

fn15 See Plaintiffs' Exhibit No.30, contract for the repair and reconstruction of Albertha Akins' house at Plot No. 20 Estate Rattan. Defendant testified that he prepared the document himself.

fn16 Abraham Hewitt testified that during Defendant's

reconstruction of the house on Plot 37, he did authorize Defendant to (1) enclose the porch (2) build an addition or extension in the back and (3) combine the two bathrooms into one and build a small bathroom and pantry.

fn17 Defendant claims that one of his workers made a mistake with respect to the placing of the rafters but that when he told Plaintiffs about the mistake, Mr. Hewitt responded that he did not want Defendant to change the roof.

fn18 Although Plaintiffs authorized the addition to the back of the house, they argue that they never authorized Defendant to extend the addition as far as he did.

fn19 A space ended up between the four- and six-inch concrete blocks and Defendant eventually had to fill in the space with concrete. Defendant claims that this was done pursuant to Mrs. Hewitt's request.

fn20 Plaintiff's' expert; Taylor Babb, as well as Abraham Hewitt and the Defendant testified that Plaintiffs' Exhibits No. l and 2 are general in nature.

fn21 Plaintiffs' expert, Taylor Babb, testified that during his inspection of the house on Plot 37, he found that the roof was improperly laid out. Specifically, the rafters on the roof were unevenly placed. Mr. Babb further testified that he did not do an estimate to correct the defect since it would be impractical as the whole roof would have to be taken off.

fn22 Abraham Hewitt testified that his wife informed

Defendant about the problems with the rafters.

fn23 At trial, Defendant retracted his earlier deposition testimony and testified that he informed Plaintiffs about raising the height of the interior wall.

fn24 The court in Cooper held that as a general rule, "the correct measure of damages resulting from the breach of a building contract is ordinarily the reasonable cost of remedying the defects which constitute a breach of contract, provided such contract has been `substantially performed' and the defects in its performance can be remedied without impairing the building as whole; but if such defects cannot be remedied without impairing the structural efficiency of the building, the measure of the damages is the difference between the value of the building as constructed and its value had it been constructed according to plans and specifications." Cooper, 386 S.W. 2d at 223.

fn25 The court in Vezina held that "[W]here expectation damages for breach of contract greatly exceed diminished value of property, award of damages is limited to diminished value of property."

fn26 The court in Bayuk held:
[W]here there was testimony to the effect that tearing and repairing defects in design and building of house would cost more than rebuilding of house in its entirety, it was proper to compute house owner's damage due to faulty design and supervision by architect based on diminution of market value due to defects.

fn27 The Court in Worthen held:

In breach of contract for faulty installment of roof in which evidence established that roof installed by builder was unusable and had to be removed and replaced, proper measure of damages was cost of replacement of roof rather than difference in value between building with roof installed by builder and with the replacement roof.

fn28 Ordinarily, the right to compensation under a building or construction contract is determined from the terms of the contract, and when the amount of compensation is specified therein it is controlling.

fn29 Although Plaintiffs claim that they paid $15,701.59 for the materials, the receipts they provided only total $14,089.04.

fn30 See Plaintiffs' Exhibit No. 15.

fn31 The only evidence found with regards to loss of rental income for the house at Plot 22-B is a letter dated June 15, 1992 from Mr. Abraham Hewitt to Defendant regarding Defendant's failure to complete his work at Plot 22-B. See Plaintiffs' Exhibit No. 9. In the letter, Mr. Hewitt states "I am further demanding that an additional $15,000.00 be paid to me which represents loss of rental income for the mentioned property between the period of April 1991 and June 1992, . . . ." However, at trial, Plaintiffs only submitted this document in support of their testimony regarding their attempts to have Defendant return the keys to Plot 22-B to them. Mr. Hewitt provided no additional testimony concerning lost rent for the house at Plot 22-B.

fn32 See Plaintiffs' Exhibit Nos. 17-1 through 17-4 and 17-7 through 17-12.

fn33 Plaintiffs provided records representing their labor as follows:

Abraham Hewitt - $10,900.00 (9101/2 hrs * $12.00)
Doreen Hewitt - $2,948.00 (536 hrs * $5.50)

fn34 Where the failure of the builder substantially to perform is willful and without justification, and the owner cannot avoid availing himself of the benefits of a partial performance, by reason of the labor and materials being attached to the owner's freehold, the builder is not entitled to any compensation for his partial performance, either on express contract or on quantum meruit, unless the contact is a divisible one.

17A C.J.S. Contracts §367(6).

fn35 Section 371 states in pertinent part:
If a sum of money is awarded to protect a party's restitution interest, it may as justice requires be measured by either

(a) the reasonable value to the other party of what he received in terms of what it would have cost him to obtain it from a person in the claimant's position, or

(b) the extent to which the other party's property has been increased in value or his other interests advanced.

fn36 The court in Ventura held

The measure of recovery in cases where there has been

no tortious conduct on the part of the recipient of the services and where both parties are equally at fault is the value of the actual benefit realized. (citing Restatement of Restitution § 1550)(1937).

fn37 See Defendant's Exhibit No. 1.

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No: 02-2478

ABRAHAM HEWITT; DOREEN HEWITT

v.

OLIVER MORTON, Appellant

Appeal from the District Court of the Virgin Islands
(D.C. Civil Action No. 99-cv-0093
District Judge: Honorable Thomas K. Moore
District Judge: Honorable Stanley S. Brotman
Territorial Judge: Honorable Ishmael A. Myers

Argued on April 28, 2003

Before: ROTH, MCKEE and COWEN Circuit Judges

ORDER

The petition for panel rehearing filed by the appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

By the Court,
Circuit Judge

Dated: October 2, 2003

sdt/cc: Edward H. Jacobs, Esq.
George W. Cannon, Jr., Esq.